STATE OF ALASKA

IBLA 77-287 Decided July 5, 1979
77-293

Consolidated appeals by the State from two decisions of the Alaska State Office of the Bureau of Land Management concerning the proposed resolution of conflicts between Native allotment applications and certain State selection applications.

Affirmed in part, reversed in part, and remanded.

1. Alaska: Land Grants and Selections: Generally -- Alaska: Native Allotments -- Appeals -- Contests and Protests: Generally -- Rules of Practice: Government Contests -- Rules of Practice: Private Contests

   Where there is a conflict between an application by the State of Alaska to select land under the Statehood Act and an application by an Alaska Native for allotment under the Act of May 17, 1906, and it appears to BLM that the Native applicant has met the requirements for patent, upon notice of this determination the State, if dissatisfied, has an election of remedies. It may not appeal from the "Notice," which is interlocutory, but it may initiate private contest proceedings to prove lack of qualification on the part of the Native, or it may appeal the subsequent decision of BLM to the Board of Land Appeals. If, on appeal, the Board concludes that the Native's application is deficient it will order the institution of Government contest proceedings, but if it finds the allotment application acceptable, it will order the patent issued, if all else be regular.

APPEARANCES: Assistant Attorney General, Anchorage, for the State of Alaska; Regional Solicitor, Anchorage, Alaska for the Bureau of Land Management; Alaska Legal Services Corporation, for Native allotment applicants.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

These cases 1/ arise by reason of a determination by the Alaska State Office of the Bureau of Land Management (BLM), to approve for patent the applications of two individuals under the Alaska Native Allotment Act, 2/ and to reject certain State selection applications filed under section 6 of the Alaska Statehood Act 3/ to the extent that the State's applications conflict.

The appeals have been consolidated. In each case the Native allotment application had been thoroughly processed by BLM, and fully adjudicated to a determination that patent should issue to the Native applicant. However, in Natalia Wassilliey, 17 IBLA 348 (1974), this Board had held that the State's interest in its selection application was adverse to that of a Native allotment applicant for the same land and that the State should be served with copies of documents relating to the allotment application and be "afforded an opportunity to set forth its position on whether the occupancy of the Native would be sufficient to prevent the State's selection rights from attaching to the land." Id. at 352. In State of Alaska, John Nusunginya, 28 IBLA 83 (1976), we took note of the Wassilliey holding and observed with consternation that the State had been given no notice of Nusunginya's subsequently filed allotment application until BLM issued a decision approving it for patent.

In the instant cases BLM, apparently acting in consideration of our expressions in Wassilliey and Nusunginya, served the State with documents, each styled a "NOTICE," and bearing the subheading, "Native Allotment Held for Approval - State Selection Held for Rejection in Part." These notices formally advised the State that BLM had "determined" that the allotment applicants had qualified to receive the lands for which they had respectively applied and their applications were being "held for approval," and that the corresponding State selection applications were being "held for rejection" as to those lands which conflicted with the allotment applications, but advised that the allotment applications had been impressed with mineral reservations, which the State might be allowed pursuant to its selection rights. The notices in each case allowed the State 60 days from

1/ Leroy E. Groat
A-56303 Native Allotment
A-053268 State Selection

Leland R. Estabrook
AA-6974 Native Allotment
AA-4805 State Selection

2/ Native Allotment Act of May 17, 1906, 34 Stat. 197, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed by the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1976), with a proviso for approval of any allotment application pending before the Department on December 18, 1971. 3/ 72 Stat. 339, 48 U.S.C. Chap. 2 (1976).

receipt within which to initiate a private contest, failing which "adverse action will be taken." A copy of the respective Native allotment field report was supplied with each of the notices. No right to appeal to this Board was recited in these notices.

Nevertheless, in each case the State of Alaska did file an appeal. BLM responded by filing a motion to dismiss. The motion asserts, inter alia, "The notice is not an appealable decision. However, when the 60 days allowed in the notice expires, if a private contest has not been initiated, a decision will be issued by BLM which will be appealable by the State if it so chooses." (Emphasis in original.)

In its statements of reasons for appeal the State contends that State of Alaska, John Nusunginya, supra, requires that BLM initiate its own contest proceeding against any Native allotment claim filed subsequent to a State selection application, at which proceeding the State may appear as an interested party. The State further maintains:

> It is clear from Nusunginya that it is the later-filed native allotment application which is in conflict with the State selection, and not the converse. Only upon validation of the native allotment application through a BLM-initiated contest proceeding against it can the allotment applicant be determined to have established a valid claim under the Allotment Act which pre-dates the filing of the state selection application. Unless and until applicant Estabrook's claim is sustained in such a BLM contest proceeding, the State's general grant selection application stands as a prior-filed application, thus segregating the land from later appropriation by applicant Estabrook. [Citations omitted.]

The State is critically in error on this point. That, most emphatically, was not the rule laid down in Nusunginya.

It is well established that a prior-filed selection application by the State does not preclude favorable consideration of a Native allotment application where evidence shows that the Native's use and occupancy of the land preceded the selection by the State. State of Alaska, John Nusunginya, supra; Lucy Ahvakana, 3 IBLA 341 (1971); Archie Wheeler, 1 IBLA 139 (1970).

The Native Allotment Act provides, at 43 U.S.C. § 270-3 (1970):

> No allotment shall be made to any person under sections 270-1 to 270-3 of this title until said person has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy

> of the land for period of five years. (May 17, 1906, ch. 2469 § 3 as added Aug. 2, 1956, ch. 891, § 1(e), 70 Stat. 954.) [Emphasis added.]

This clearly requires the allotment applicant to carry the burden of proving his compliance with the law by evidence which is sufficient to satisfy the Secretary's delegate, BLM. Once BLM is satisfied, however, it is at liberty to approve the application and, absent any contravening factors, to issue the allotment patent. Even so, if the State has asserted adverse or conflicting rights, interests or claims which are outstanding, there should be no final decision by BLM in favor of the allotment applicant until the State has been afforded the opportunity to demonstrate that its entitlement to the land is superior. The "notice" given by BLM to the State was an appropriate means of accomplishing this.

The issuance of such notice serves, in the vernacular of the day, "to put the ball in the State's court." It then devolves on the State to act in contravention, or to refrain from action and allow the BLM to conclude its adjudication. If the State chooses to respond, it has an election of remedies. It may, within the 60-day period prescribed, initiate a private contest proceeding pursuant to 43 CFR 4.450-1, 4/ or, upon issuance of a decision concluding BLM's adjudication, it may appeal to this Board. If it elects to initiate a private contest, an appeal to this Board may be brought by any party adversely affected by the resultant decision. If, on the other hand, the State elects to appeal directly to this Board from a dispositive decision by BLM, the State must recognize that a decision by this Board which disposes of a case is final, that no further appeal will lie in this Department, and the administrative remedy is exhausted. 43 CFR 4.21(c). Therefore, if the State elects to appeal to this Board rather than bring a private contest, the State will have no further administrative recourse if the Board affirms the action of BLM.

In Nusunginya, supra, the Board held that the evidence of the allotment applicant's compliance was not "satisfactory to the Secretary of the Interior," although it was deemed satisfactory to BLM. Therefore, the Board reversed the BLM decision, and because of the requirement that a Native allotment cannot be summarily rejected without notice and opportunity for an oral hearing, the Board directed that BLM initiate a Government contest proceeding against the allotment claim. 5/ This result flowed exclusively from the Board's conclusion

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4/ In the context of this regulation we have held that the term "person" includes a State. See e.g., State of Alaska, 40 IBLA 79 (1979), and cases cited therein.

5/ In Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), the court held that prior to rejection of an Alaska Native allotment application

that BLM had erred in finding that Nusunginya's evidence was ultimately sufficient to prove his qualification to the satisfaction of the Secretary. It did not hold, and may not be construed as holding, that BLM must bring a Government contest in every case where an allotment application was filed later than the State's application for the same land.

It borders on the ludicrous to suggest that the Department must bring a Government contest of an allotment claim in a case where the Native applicant had fully met his obligation of proving to the satisfaction of the proper Departmental officer or tribunal that he was fully entitled to the land. What would the Government charge in its complaint? How could the contest be prosecuted? What evidence would the Government offer to show that the allotment applicant is not qualified when it is fully satisfied that he is qualified? However, as noted above, if the State believes BLM erred in accepting the allotment applicant's evidence as sufficient, it may seek a review of that determination by appealing to this Board, or, if the State has countervailing evidence of its own, it may initiate private contest proceedings.

When the "notices" were given to the State by BLM, affording the State the opportunity to initiate private contest proceedings, it was BLM's intention to issue a subsequent "decision" which would conclude its adjudication in each of these cases, and constitute the "adverse action" which would give rise to the right to appeal to this Board. BLM did not intend that the "notice" would be the subject of an appeal by the State, regarding it only as an interim procedural device. For this reason BLM, acting by and through the Regional Solicitor, has moved for the dismissal of these appeals on the ground that they are interlocutory in nature.

Inasmuch as this "notice/decision" procedure has been specially adopted by BLM in an effort to deal with the problems peculiar to those situations where allotment applications conflict with State selection applications, it is necessary to formulate a rule for the appellate process to insure fairness and avoid repetitive appeals of the same cases.

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fn. 5 (continued)
under the 1906 Act, the applicant must be given notice and an opportunity for an oral hearing. In Donald Peters, 26 IBLA 235 (1976), reaffirmed, 28 IBLA 153 (1976), this Board held that the Department's contest procedures would appropriately afford the due process envisioned by the court in Pence. The court thereafter found that these procedures do comply. Pence v. Andrus, No. 77-2387 (9th Cir. Nov. 22, 1978).

Accordingly, we hold that the "Notice" is not appealable to this Board when issued. Upon receipt of such notice the State will have the time prescribed therein which to initiate private contest proceedings. If it elects not to do so, it may inform BLM or simply allow the time to lapse, whereupon BLM will issue the decision concluding its adjudication. The State may then appeal to this Board from such decision in accordance with 43 CFR 4.400. This Board will then review and decide the case on its merits. Should the Board conclude that the Native applicant has failed as a matter of fact to show by satisfactory evidence that he is entitled to the allotment, or any portion thereof, the case will be remanded to BLM for initiation of a Government contest, as in the Nusunginya case. If, however, the Board should affirm BLM's decision to award the allotment, that will exhaust the State's administrative remedy, and patent will issue unless the State promptly seeks judicial review.

Of course, any party adversely affected by a decision rendered at either a private contest or a Government contest would have the right of appeal to this Board.

So that this procedure will not be applied to the prejudice of cases now pending, the State's appeals from these BLM "notices" will be, and hereby are, dismissed as interlocutory, but the State shall have 65 days from date hereof in which to file private contest complaints in any of the subject cases. At the end of the 65-day period, if no private contest complaint has been filed, BLM may then render its final decision, from which the State may appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior 43 CFR 4.1, the appeals are dismissed without prejudice for further action consistent with this opinion.

Edward W. Stuebing
Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

James L. Burski
Administrative Judge